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No. 92-927

In The
Supreme Court of the United States

October Term, 1992

United States of America, ex rel.,
The Precision Company,
Petitioner,
v.
Koch Industries, Inc., et al.,
Respondents.

Council of Energy Resource Tribes
and the Osage Tribe of Oklahoma
Motion for Leave to File
Brief *Amicus Curiae*
in Support of The Precision Company's
Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit
and Brief *Amicus Curiae*

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF *AMICUS CURIAE*

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Motion for Leave to File Brief *Amicus Curiae*

The Council of Energy Resource Tribes and the Osage Tribe of Oklahoma hereby respectfully move for leave to file the attached Brief *Amicus Curiae* in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondents was requested but refused.

Amici Curiae, who represent fifty-four federally recognized Indian tribes, have a substantial stake in the outcome of this False Claims Act case. Successful prosecution of Petitioner's claim will result in a significant direct recovery for those Indian tribes and their members. In addition, the False Claims Act, properly interpreted, represents a valuable tool in the limited arsenal available to Indian tribes to protect their natural resources and the federal appropriations that are made available to the tribes and their members. A common sense interpretation of the jurisdictional provisions of the False Claims Act by this Court will thus have an additional broad general impact upon the interests of *Amici Curiae*.

The Tenth Circuit's decision below is, as Petitioner

has argued, contrary to better reasoned decisions of other federal circuits, and is contrary to applicable doctrines of statutory interpretation. However, Petitioner has failed to address several issues important to a full and complete analysis of this case. The Petition does not mention the Tenth Circuit's error in invoking inapposite considerations of federalism in a case involving fraud against the United States, does not adequately address and protect the specific claims of Indian tribes and individuals whose rights are being asserted by the Complaint, and does not raise certain important public policy considerations arising from the decision below. *Amici Curiae* believe that the Brief which they intend to file will be helpful to the Court in analyzing these issues.

The Council of Energy Resource Tribes and the Osage Tribe of Oklahoma therefore respectfully request, pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, that this Court grant them leave to file the attached Brief *Amicus Curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE*

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred in holding that a *qui tam* action "based upon" an extensive independent investigation of fraudulent activities is barred by Section 3730(e)(4)(A) of the False Claims Act because the action is in any way "supported by" allegations that have been publicly disclosed.

2. Whether the Tenth Circuit erred in holding that a closely held corporation does not qualify as an "original source" under Section 3730(e)(4)(B) of the False Claims Act even though both of its shareholders have "direct and independent knowledge" of the fraudulent activities that form the basis for the *qui tam* action.

3. Whether the Tenth Circuit employed an inappropriate analytic framework for interpreting the jurisdictional provisions of the False Claims Act Amendments of 1986, and failed to consider properly the claims of Indian tribes and individuals represented by the Complaint below.

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INTEREST OF *AMICI CURIAE*

Amici Curiae Council of Energy Resource Tribes ("CERT") and the Osage Tribe of Oklahoma represent a number of real parties in interest to this litigation.[1] The Council, founded in 1976, is a membership organization presently composed of fifty-three federally recognized Indian tribes, including oil and gas producing tribes located from Montana to Oklahoma and from North Dakota to Arizona, covering some of the nation's most prolific onshore oil and gas provinces.[2] The Osage Tribe of Oklahoma, an important producer of oil and gas in its own

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[1]Rule 17(a) of the Federal Rules of Civil Procedure, which generally requires that actions be prosecuted in the name of the real party in interest, is not contravened since the present action is brought in the name of the United States, and the United States attorney is explicitly authorized to bring such actions in all states where there are reservations or allotted Indians. See 25 U.S.C. §175.

[2]Member tribes of the Council of Energy Resource Tribes include: Acoma Pueblo, Assiniboine and Sioux Tribes of the Fort Peck Reservation, Blackfeet Tribe, Chemeheuvi Tribe, Cherokee Nation of Oklahoma, Cheyenne-Arapaho Tribes of Oklahoma, Cheyenne River Sioux Tribe, Chippewa Cree Tribe, Coeur D'Alene Tribe of Idaho, Crow Tribe, Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation, Hopi Tribe, Hualapai Tribe, Jemez Pueblo, Jicarilla Apache Tribe, Kaibab Paiute Tribe, Kalispel Tribe, Menominee Tribe, Navajo Tribe, Nez Perce Tribe, Northern Cheyenne Tribe, Northern Ute Indian Tribe, Oglala Sioux Tribe, Paiute Tribe of Utah, Pauma Band of Mission Indians, Pawnee Tribe, Penobscot Nation, Pojoaque Pueblo, Ponca Tribe of Oklahoma, Pueblo of Laguna, Pyramid Lake Paiute Tribe, Rosebud Sioux Tribe, Sac and Fox Nation, Saginaw Chippewa Indian Tribe, St. Regis Mohawk Tribe, Confederated Salish and Kootenai Tribes of the Flathead Reservation, San Juan Pueblo, Santa Ana Pueblo, Seminole Tribe of Florida, Shoshone-Bannock Tribes of the Fort Hall Reservation, Southern Ute Tribe, Spokane Tribe, Standing Rock Sioux Tribe, Three Affiliated Tribes (Mandan, Hidatsa, Arikara) of the Fort Berthold Reservation, Tule River Tribe, Turtle Mountain Band of Chippewa Indians, Confederated Tribes of the Umatilla Reservation, Ute Mountain Ute Tribe, Walker River Paiute Tribe, Wichita Tribe, Yakima Indian Nation, and Zia Pueblo.

right, has produced more crude oil than any other tribe in the nation.

Amici tribes, in turn, have literally hundreds of thousands of individual members, thousands of whom are possessed of individually allotted lands that also produce oil and gas. For many of these tribes and their members, oil and gas production represents the backbone of their ability to participate in a cash economy. As the court below has noted in another context:

> All too often in the past, unscrupulous developers have preyed on Indian tribes that lacked the technical sophistication and legal expertise to protect their rights. . . . A single tribe, backed into an impoverished corner, lacks the bargaining power to deal fairly with enormous multinational energy developers. By banding together to create their own sources of technical and legal expertise, Indian tribes can protect their resources. CERT represents an attempt to make that protection possible.

Dille v. Cert, 610 F. 2d 157, 159 (10th Cir. 1986), (*quoting* 610 F. Supp. 157) (D. Colo. 1985). Properly interpreted, the False Claims Act, as amended in 1986, 31 U.S.C. §3729, *et seq.*, represents a valuable tool in the limited arsenal available to all tribes to protect their natural resources, as well as federal appropriations that are made available to provide services to those within their jurisdictions.

This Court has long recognized both the authority and the fiduciary duty of the federal government to protect the rights of Indian tribes and individuals in their real property, including oil and gas property. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968). In Poafpybitty, this Court expressed that authority and duty as follows: "If the Government does determine that there has been . . .

violation of a lease, *it will of course satisfy its trust obligation by filing the necessary court action."* 390 U.S. at 372 (emphasis added). Notwithstanding the confidence expressed by the Court that government officials will appropriately protect the interests of Indian oil and gas owners, history has shown that Indians themselves have often had to sue to compel the discharge of these fiduciary duties.[3]

The general failures of the government to account properly for oil and gas produced from federal and Indian lands have been exhaustively documented in recent years. In 1982, for example, the Commission on Fiscal Accountability of the Nation's Energy Resources reported to the President that, "In short, the industry is essentially on an honor system."[4] In 1983, Congress also found that "the Secretary of the Interior should aggressively carry out his trust responsibility in the administration of Indian oil and gas," and that in doing so, he shall, *inter alia*, "establish a comprehensive production accounting and auditing system ..." 30 U.S.C. §§1701(a)(4), 1711(a). Notwithstanding these findings, in 1990 the Secretary of the Interior acknowledged in a report to the President that the potential cost of failing to account for production may be as much as five hundred million dollars ($500,000,000.00),[5] and in

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[3]*See, e.g.,* Jicarilla Apache Tribe v. Continental Oil Co., et al. *[including Secretary of the Interior],* No. CIV-76-430-C (D. N.M.); Jicarilla Apache Tribe v. Supron Energy Corp., et al. *[including Secretary of the Interior],* 728 F. 2d 1555 (rehearing March 30, 1984) (rehearing *en banc*) 782 F. 2d 855 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 471 (1986).

[4]Report of the Commission on Fiscal Accountability of the Nation's Energy Resources (Linowes Commission) (Jan. 1982), at 15.

[5]The Federal Manager's Fiscal Integrity Act, Secretary's Annual Statement And Report To The President And The Congress, U.S. Department of the Interior, (December 1990), at D-13.

1991 the Director of the Minerals Management Service reported that the industry is still essentially on an honor system.[6]

The Complaint below involves allegations of a pattern of fraudulent activity by Respondents across virtually all the oil producing states in which *amici* tribes are located, and from the pleadings, Petitioner, the *qui tam* plaintiff below, has made substantial efforts to develop this case. *See* Petition at 4-6. Even if they possessed the information Petitioner has developed, Indian tribes themselves could not possibly hope to prosecute to judgment a multi-state action such as this against a colossus of the industry such as Respondents in this case.[7] The tribes could only take their information to the government and urge the government to act. If history is any guide, the government's actions, if any, would be only those

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[6]Report To The Secretary Of The Task Force On Royalty Compliance, Office of Assistant Secretary - Land and Minerals Management, Minerals Management Service, U.S. Department of the Interior (June 1991).

[7]Respondents include the largest privately held oil company in the United States, and collectively are the largest independent purchasers of crude oil in the United States and Canada, and the largest purchaser of, and payor of royalties on, crude oil produced from Indian lands. S. Rep. 101-60 (101st Cong., 1st Sess.), 105-106, 141, notes 4 and 5. By way of comparison, excluding the Osage Reservation, in 1987, Koch, Texaco, and Amoco were the three largest purchasers of crude oil from Indian lands, and of these three, Koch's royalty payments of $9.5 million were 45% of the total of these three combined. *Id.*, at 141, n.4. In 1988, Koch purchased more than 3 million barrels of crude oil from the Osage Reservation alone. *See, also,* Tiller, *The Jicarilla Apache Tribe: A History, rev. ed., 1992* (University of Nebraska, 1992), at 234. In the early 1970's that tribe spent more than $200,000 in oil and gas accounting litigation that was settled before discovery, resulting in, *inter alia*, collections of more than $1 million. The record below reveals that the *qui tam* plaintiff in this case had invested more than $750,000 in developing the case at bar as of May 1990.

compelled by action against the government.[8]

In significant respects, the issue before this Court is the same as that presented in *Poafpybitty, supra*, namely, whether the action below should be allowed to proceed. Here, as this Court observed in that case, "the Government made no attempt to intervene in the proceedings." 390 U.S. at 367. What is different in this case is that, in light of the Secretary's own admissions, we can no longer share the Court's confidence of 1968 that, if there have been violations, the government "will of course satisfy its trust obligations by filing the necessary court action." *Id.*, at 372.

Instead, we have here the candid admissions of the political branches of the government that the government cannot account for production from federal and Indian lands, and we have standing in the government's shoes a relator that has invested substantially in developing the government's case under a federal statute designed expressly to allow cases such as the one at bar to proceed in the government's absence. If this action is defeated on narrow jurisdictional grounds, there is very likely no forum in which the allegations raised in the Complaint will ever be heard.

As was also noted in *Poafpybitty*, this Court "intimate[s] no view on the merits of the case" when it allows the action to proceed. *Id.*, at 376. If the allegations raised in the Complaint cannot be proven at trial, "the suit may fail." *Id.* If, on the other hand, Petitioner should prevail, an enormous public service will have been performed, not only in terms of the government's fiduciary responsibilities to Indian tribes and allottees, but to the nation's Treasury as well. As four members of this Court have recently observed, "... a trial on the merits, whether in a civil or criminal case, is the 'main event' ..."[9]

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[8] *See* note 3, *supra*, and accompanying text.

[9] *Freytag v. Commissioner*, 111 S.Ct. 2631, 115 L.Ed.2d 764, 790 (1991) (Scalia, J., joined by O'Connor, Kennedy, Souter, JJ.,

The narrow jurisdictional question presented by this case masks fundamental issues of statutory interpretation in modern jurisprudence that have clearly divided the federal circuits, and that this Court should clarify. For the reasons set forth below, *Amici Curiae* Council of Energy Resource Tribes and the Osage Tribe of Oklahoma urge this Court to grant Petitioner's Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. The Tenth Circuit's Ruling is Contrary to Better Reasoned Decisions of Other Federal Circuits.

   A. *The Tenth Circuit committed the very error it sought to avoid in purporting to find the "plain language" of the statute dispositive.*

The False Claims Act provides that an action "based upon public disclosures of allegations or transactions" can be maintained by a relator only if the plaintiff qualifies as an "original source." 31 U.S.C. §3730(e)(4)(A). Whether a *qui tam* complaint is "based upon" a public disclosure is, then, an important threshold question. This Court has previously allowed to stand a decision by the Seventh Circuit that squarely supports the contention of Petitioner on that important question in this case. "[T]he Act in its present form does not allow a *qui tam* plaintiff to bring an action based *solely* on publicly disclosed transactions. Houck on Behalf of U.S. v. Folding Carton Admin., 881 F.2d 494, 504 (7th Cir.) (emphasis added), cert. denied, 494 U.S. 1026 (1989). The First, Third, and Eleventh Circuits[10] have all

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concurring) (citations omitted).

[10] United States ex rel. LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, 111 S.Ct. 1312 (1991); United States ex rel.

subsequently adopted rulings that support this interpretation given to Section 3730(e)(4)(A).

The court below expressly rejected that reading of the statute, however, concluding that such an interpretation "would dramatically alter the statute's plain meaning." *U.S. ex rel. The Precision Co. v. Koch Industries*, 971 F.2d 548, 551 (10th Cir. 1992). Having declined "to insert the adverb 'solely'," the courts below then proceeded to insert into the "plain and unambiguous language" of the statute an equally modifying prepositional phrase, instead, and concluded that "a plaintiff whose *qui tam* action is based *in any part* upon publicly disclosed information is subject to the 'original source' jurisdictional requirement." *Id.*, at 551 and 553 (emphasis added).

If the statute is unambiguous, it needs no interstitial drafting such as that provided by the courts below. Conversely, if the statute does require such a statutory filler, it is not unambiguous as the court below ruled. If, on the other hand, the statute contains many ambiguities, as the Third Circuit has found,[11] then the construction adopted by the First, Third, Seventh, and Eleventh Circuits, and advanced by Petitioner here, is far more sound than that adopted by the court below.

Only the Second Circuit seems to have developed a view of this important threshold question that corresponds to that adopted by the courts below, and neither of the cases examined by that circuit bears comparison with the facts of the instant action. In the first of those, the relator conceded in deposition that he became aware of the facts upon which he sought to base his complaint in a newspaper article. *United States ex rel. Dick v. Long Island Lighting Co.*, 912

Williams v. NEC Corp., 931 F. 2d 1493, 1500 (11th Cir. 1991); *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1159-60 (3d Cir. 1991).

[11] *Stinson*, n. 10, *supra*, at 1154.

F.2d 13,15 (2d Cir. 1990). In the other case reviewed by that Circuit, *United States ex rel. John Doe, v. John Doe Corporation,* 960 F.2d 318 (2d Cir. 1992), the government moved to dismiss the action brought by an attorney who had negotiated a release of the putative claim from his own client who was already under criminal investigation. *Id.*, at 319, 323.

At this stage, this Court need only resolve the important threshold issue presented by 31 U.S.C. §3730(e)(4)(A). This case should be remanded with instructions for the lower courts to apply the same "common sense" direction this Court recently provided in *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 57 (1987) (and cases cited), in a manner consistent with the conclusions reached by the First, Third, Seventh, and Eleventh Circuits.

B. *The Tenth Circuit erred in interpreting the statute in a way that renders related provisions meaningless.*

Quoting Chief Justice Taney in *United States v Heirs of Boisdore'*, 8 How. 113, 122, 49 U.S. 113 (1850), this Court, in a unanimous opinion, recently observed that, "On numerous occasions we have noted that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Pilot Life Insurance Co. v Dedeaux,* 481 U.S. 41, 51 (1987) *(citations omitted).* This principle was forcefully reaffirmed as recently as 1990. "In determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon, et al. v. United States,* 494 U.S. 152, 158 (1990).

In closely related provisions of the very section of the statute here involved, it is expressly provided that, with

the permission of the court and for good cause shown, the government may intervene at a later date in an action brought by a *qui tam* plaintiff. 31 U.S.C. §3730(c)(3). Subsection (d)(1), in turn, expressly limits the recovery a plaintiff-relator may claim if the government does intervene and the court finds the action "to be based *primarily* on disclosures of specific information (other than information provided by the person bringing the action) ..., taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation." 31 U.S.C. §3730(d)(1) (emphasis added), (parentheses in original). Section 3730 of the False Claims Act, as amended in 1986, thus clearly contemplates that some actions brought by *qui tam* plaintiffs will be based "primarily" on publicly disclosed information, and that such information may well be other than that provided by the person bringing the action.

The district court below found Section 3730(d)(1) to be irrelevant because it deals only with actions in which the government elects to proceed. Petition, at 28. The Tenth Circuit apparently found it unnecessary even to consider this issue raised on appeal because it found Section 3730(e)(4)(A) to be such "a quick trigger" that further analysis in the context of preceding provisions and of the statute as a whole was unnecessary. Koch, *supra*, at 552. In fact, under the reasoning adopted by the courts below, there will never be "a later date" at which the government might choose to intervene in this case, nor an opportunity for the court to take into consideration the significance of the information and the role of the person advancing the case to litigation. Such reasoning completely ignores the counsel of this Court in Crandon and its predecessors dating back to 1849. "It is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect. An interpretation that needlessly renders some words superfluous is suspect." Crandon, *supra.*, at 171 (Scalia, J., concurring).

C. *The Tenth Circuit's ruling that corporate plaintiff does not have direct and independent knowledge is inconsistent with rulings of other federal circuits and the larger federal corpus juris.*

The Tenth Circuit acknowledges that 31 U.S.C. §3730(e)(4)(B) is not implicated at all if plaintiff's complaint is not, in fact, "based upon" a public disclosure. Koch, *supra,* at 552, n.2. Having (improperly, *amici* contend) reached that question, however, the Tenth Circuit found it notable that Petitioner, The Precision Company, is the plaintiff (not its sole founders and shareholders), and concluded that the corporate plaintiff does not possess the "direct and independent knowledge" required to proceed. Koch, *supra*, at 554.

This Court, on the other hand, has allowed to stand a ruling by the First Circuit that an employee whose job it is to uncover fraud cannot qualify as an original source precisely because "the fruits of his labor belong to his employer." U.S. ex rel. LeBlanc v. Raytheon, 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, 111 S. Ct. 1312 (1991). Likewise, the Third Circuit saw no difficulty in permitting a law firm to seek to qualify as a proper *qui tam* plaintiff. Stinson, *supra,* at 1150-51 (action dismissed on other grounds).

More importantly, however, for nearly one hundred forty years, this Court has held that a corporation is a "person" for purposes of federal jurisprudence. Mr. Chief Justice Marshall's opinion for this Court to the contrary in Bank of U.S. v. Deveaux, 5 Cranch 61, 9 U.S. 61 (1809) survived only thirty-five years, and was overturned by a unanimous Court, reciting that Marshall himself had been unhappy with his own decision in Deveaux. "[A] corporation ... is to be deemed to all intents and purposes as

a person, although an artificial person, ... as much as a natural person." *Louisville, Cincinnati and Charleston R.R. Co. v. Letson,* 2 How. 497, 554-59, 43 U.S. 497 (1844). This rule has not changed since *Letson* was announced, and has recently been forcefully reaffirmed by this Court. "A corporation is the paradigmatic artificial 'person'..." *Carden v. Arkoma Associates,* 110 S. Ct. 1015, 1017 (1990).[12] The Tenth Circuit's ruling below cannot be squared with this long-standing principle of federal jurisprudence.

The Tenth Circuit's opinion readily acknowledges that substantial identity exists between the allegations in the instant case and those made in earlier litigation brought by Petitioner's principal shareholder, and also notes substantial identity between the allegations raised before the Senate committee and those contained in the present proceeding. *Koch, supra*, at 553-54. Notwithstanding that the record is undisputed, and that Respondents concede that Petitioner's sole shareholders provided the Senate Committee with much of their information, the Tenth Circuit concluded that the closely held corporation cannot qualify as an original source of the information that was provided to the government by its sole shareholders and founders. See Petition, at 8.

2. The Tenth Circuit's Ruling is Contrary to Applicable Doctrines of Statutory Interpretation

A. *The Tenth Circuit erred in invoking inapposite considerations of federalism in a case involving fraud against the United States.*

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[12]The sharp dissent in *Carden* did not take issue with the Court's observation that this rule will not be disturbed, but, rather, disagreed with the majority's refusal to extend similar treatment to other artificial entities in appropriate circumstances. *Carden, supra,* at 1022-28 (O'Connor, J., *dissenting*).

The Tenth Circuit's analysis below proceeded from an assumption that "Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent a showing of proof by the party asserting jurisdiction." Koch, *supra.*, at 551 *(citation omitted)*. Accordingly, the court below reasoned, "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *Id.*, at 552 *(citation omitted)*.

From this analytical framework, the court below found that "To insert the term 'solely' into §3730(e)(4)(A) would impermissibly expand federal jurisdiction ..." *Id.* From there, it was a short step for the court to insert, instead, the prepositional phrase "in any part" into the statute in order to achieve the predetermined result of resolving any doubts "against federal jurisdiction."

This analytical framework is misplaced in interpreting a statute involving a fraud against the United States in connection with the payment of royalties due on oil and gas produced from federal and Indian lands. The authorities cited by the Tenth Circuit below stem from well-founded principles of federalism and have been invoked by the courts regularly to defeat attempts to invoke the federal courts to resolve disputes that properly belong in the courts of the various states. Thus, statutes conferring federal jurisdiction on the basis of diversity of citizenship and amounts in controversy have been strictly construed. *Penteco Corp. v. Union Gas System*, 929 F.2d 1519 (10th Cir. 1991); *Carden v. Arkoma Associates.*, 494 U.S. 185 (1990); *Glover v. Johns-Manville Corp.*, 662 F.2d 225 (4th Cir. 1981). These cases involve considerations that go to the very fabric of our Republic and present federal courts with the issue of proceeding at all only in derogation of the sovereignty of the various states. Those considerations have no place in this case, which involves only considerations of federal law.

In the diversity cases cited by the Tenth Circuit, the

litigants could repair to the courts of the states. In the instant case, if Petitioner is not allowed to proceed in the name of the government, the federal government's and *amici* Indian tribes' interests will have no forum at all, precisely the circumstances that should mandate the unflagging exercise of federal jurisdiction where it does exist.

The Tenth Circuit, alone among the seven federal circuits that have reviewed the False Claims Act Amendments of 1986, has adverted to a doctrine applicable to principles of federalism in order to defeat federal jurisdiction in a case involving fraud against wards of the federal government and against the government itself, and has done so in a case involving a statute which was enacted in order to encourage private citizens to prosecute cases of fraud against the federal government in the federal courts.

"The duties of [the federal courts] to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation." *Carden, supra,* 110 S.Ct. 1015, at 1023 (1990) (O'Connor, J., dissenting), (quoting Marshall, Ch. J., in *U.S. Bank v. Deveaux,* 5 Cranch 61, 87, 9 U.S. 61 (1809) (*rev'd on other grounds*), *Letson, supra*.

B. *The Tenth Circuit did not properly consider the claims of Indian tribes and individuals represented by the Complaint.*

The courts below were correct, of course, in recognizing that federal courts are courts of limited jurisdiction. Where, as here, however, it was well pleaded[13] that the jurisdiction of the federal courts is being invoked not only to protect the federal Treasury from fraud, but also to carry out the federal government's fiduciary duty to

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[13] *See* Complaint, ¶¶ 23, at 6; 25, at 7; 45, at 14; 49, at 16.

protect its Indian wards from that same fraud, the courts below should have realized that their construction of the jurisdictional statute was at odds with another principle that is equally rooted in the nation's federal jurisprudence:

> "When we are faced with these two possible constructions, our choice between them must be rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' *Montana v. Blackfeet Tribe of Indians*, 471 U.S., at 766, 105 S. Ct., at 2403. See also *McClanahan v. Arizona Tax Commission*, 411 U.S., at 174, 94 S. Ct., at 1263."

County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 693 (1992).

Where a relator stands in the shoes of the federal government to protect the interests of Indian oil and gas owners to whom the nation owes a fiduciary duty, as well as to protect the national Treasury, the courts below should have taken into consideration the doctrines of statutory interpretation applicable to federal-Indian law. If Petitioner proceeds in the name of the government, or if the government intervenes, Indian tribes and individuals may well find themselves bound by application of the doctrine of *res judicata*. *See, Nevada v. U.S.*, 463 U.S. 110, 129-45 (1983); *Arizona v. California*, 460 U.S. 605, 626-29 (1983); *Heckman v. U.S.*, 224 U.S. 413, 443-46 (1912). If Indians' interests can be determined by this litigation, their relator representing those interests should be accorded the same presumptions that the government or the tribes themselves would receive if they were in court. The lower courts are in need of this direction, and it can only come from this Court.

PUBLIC POLICY REASONS FOR GRANTING THE PETITION

1. The Federal Circuits are Clearly in Need of This Court's Guidance for Development of a Consistent Body of Law in the Judicial Administration of the False Claims Act.

This Court has steered well clear of the jurisdictional requirements of the *qui tam* provisions of the False Claims Act Amendments of 1986, and has allowed the law to develop in the various circuits. Unfortunately, the law is developing in no particular direction or pattern. The seven federal circuits that have wrestled with the two jurisdictional bars at issue here, 31 U.S.C. §§ 3730(e)(4)(A) and (B), have developed no consistent body of case law. Plaintiffs who have unsuccessfully assaulted these barriers in one circuit almost certainly would have been successful in other circuits.[14] More disturbingly, plaintiffs who successfully survived challenges under these provisions in

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[14]Compare, e.g., *United States ex rel. Williams v. NEC*, 931 F.2d 1493, 1500 (11th Cir. 1991) with *United States ex re. LeBlanc v. Raytheon Company*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1312 (1991).

some circuits almost certainly would have found themselves out of court in other circuits.[15] The lower federal courts have wrestled valiantly with the meaning of such terms as "based upon",[16] "public",[17] "disclosure",[18] "public disclosure",[19] "hearing",[20] "information",[21] "original source",[22] "direct",[23] "independent",[24] and "direct and independent",[25] as they are used in this statute. The "practical considerations of judicial economy" the Tenth Circuit sought to serve are certainly not advanced by this method of jurisprudence. See *Koch*, *supra* at 553. If the law should not depend on what the judge had for breakfast, neither should the law of the land be dependent upon

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[15] Compare, e.g., *United States ex rel. Hagood v. Sonoma County Water Works*, 929 F.2d 1416 (9th Cir. 1991), with *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991).

[16] *United States ex rel. LaValley v. First Nat. Bank of Boston*, 707 F. Supp. 1351, 1366 (D. Mass. 1988); *Houck*, *supra*, at 504; *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2nd Cir. 1990); *United States ex rel. The Precision Co. v. Koch Industries*, 971 F.2d 548, 552-54 (10th Cir. 1992).

[17] *United States ex rel John Doe v. John Doe Corporation*, 960 F.2d 318, 322 (2nd Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Works*, 929 F.2d 1416, 1419 (9th Cir. 1991).

[18] *LaValley*, *supra*, n.15, at 1366; *United States ex rel. Hagood v. Sonoma County Water Works*, 929 F. 2d 1416, 1419 (9th Cir. 1991).

[19] *Stinson*, *supra*, at 1157-1160; *Williams*, *supra*, at 1499-1500.

[20] *Stinson*, *supra*, at 1155; *LaValley*, *supra*, at 1366.

[21] *Dick*, *supra*, at 16.

[22] *Stinson*, *supra*, at 1160.

[23] *Stinson*, *supra*, at 1160-1161.

[24] *Stinson*, *supra*, at 1159-1160; *LeBlanc*, *supra*, at 20.

[25] *Stinson*, *supra*, at 1159-1160; *LeBlanc*, *supra*, at 17.

longitude and latitude.

2. The Ruling Below Penalizes Cooperation with the Political Branches of the Government.

Amici Indian tribes cooperate routinely and willingly with many arms and agencies of the government. They confer regularly with members and committees of Congress, respond to inquiries from Inspectors General from many Executive Departments, cooperate with the Comptroller General and General Accounting Office, and respond to inquiries from other government agents and officials. The ruling of the Tenth Circuit effectively starts the clock on precipitous races to the courthouse with each instance of such cooperation.

Petitioner here developed its case much as the prosecutorial arm of the Executive Branch would have: locating and interviewing witnesses, commissioning surveillances, and developing the case methodically to include admissions against interest from more than one hundred potential witnesses. When importuned by a duly sanctioned investigating arm of the Legislative Branch, Petitioner cooperated fully. And for this cooperation with duly constituted authorities of the political branches, the Tenth Circuit has stripped Petitioner of its ability to fulfill the purpose of the very law at issue. The impetus for future *qui tam* plaintiffs to refuse to cooperate, or to file first and cooperate later, is obvious. A statutory interpretation that produces such a result should not be allowed to stand if another interpretation is readily available.

3. The Ruling Below Defeats the Purpose of the False Claims Act.

The Tenth Circuit's ruling that only a qualifying "original source" may bring any *qui tam* action that is *in any part supported by* a previous disclosure of the allegations

effectively strips the False Claims Act from the arsenal available to Indian tribes to protect either their own resources or the increasingly scarce federal appropriations available to them for construction of housing, roads, hospitals, schools, education, or for the delivery of welfare services. *Koch, supra,* at 552 (emphasis added). Respondents concede, and the courts below acknowledge, that the founders and sole shareholders of corporate plaintiff herein contributed significantly to the disclosure of the fraud. *Qui facit per alium facit per se.*

CONCLUSION

The question presented is whether or not Petitioner shall be allowed to present its evidence. In deciding this question, the Tenth Circuit should have been led by analysis, and not driven by inapposite assumptions. "The purpose of Congress is the ultimate touchstone," for the beginning of that analysis. *Pilot Life, supra,* 481 U.S. at 45 (1987) quoting *Allis Chalmers Corp. v. Lueck,* 471 U.S. 202, 208 (1985), quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103 (1963). The Tenth Circuit below correctly noted that the False Claims Act, as amended in 1986, has two basic goals:

> "1) to encourage private citizens with first-hand knowledge to expose fraud; and 2) to avoid civil actions by opportunists attempting to capitalize on public information without *seriously contributing* to the disclosure of the fraud."

(emphasis added). This acknowledged purpose of Congress is thwarted by the ruling of the Tenth Circuit below. *Amici* Indian tribes respectfully request this Court to grant the

Petition; to remand the case with instructions that provide the lower federal courts with the guidance so clearly necessary for the development of a consistent body of law in the judicial administration of the False Claims Act; and to allow the evidence that has been developed in this case to see the light of day.

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